The Death of the 'Community Method' ... and the Immediate Future of the EU

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The death of the 'Community method' …and the immediate future of the EU

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1. Introduction

The so-called Community method has been very successful in the first five decades of existence of the EEC/EC/EU. Since the Treaty of Maastricht (1991) and the increase in the number of member-states from six to twenty-eight the method has become obsolescent[1]. Let us be clear: the Community method is dead. I agree with Majone that this method was designed only for a small group of homogeneous countries in 1958. But what is the next stage of European integration now that member-states strongly disagree about the pace and nature of the process? How can we change, starting from this method? 'Europe can't be reformed', was heard during the Brexit campaign in the UK in 2016. One core characteristic of the Community method has always been to be vague about the finality, the end-goal, of the integration process. European integration was created as a rational and not an emotional process. This vague finality and the idea of a never stopping bullet train to ever more integration and a higher number of member-states is at the basis of increasing unease and discomfort in not only the old member-states, but also in the newer Central and East-European member-states. The very idea of supranationalism seems to be at stake. The nation states are the building blocks of the EU and the masters of the Treaties *('Herren der Verträge')*. If large parts of the population in the nation states are uncomfortable with the EU as it has been developed, the EU itself will be in trouble.

This contribution will start from the assumption that there is an urgent need to move beyond the Community method in European integration and cooperation. Are the options the European Commission put on the table the 1st of March 2017 an alternative to the Community method? Or are more common terms such as 'confederation' or 'federation' to be preferred? It is not a speculative argument that will be presented. I will pay attention to how we can move away from the actual Community method, taking the rapidly changing global context into account. It will pay attention to theoretical approaches to the nature of European integration, but also legal issues focusing on recent case law of the CJEU that is already paying more 'respect' to issues related to national identity.

2. The Community method

[1] Giandomenico Majone, *Europe as the Would-be World Power*, (Cambridge: Cambridge University Press, 2009), chapter 7.

The Community method, basically, consists of ground-rules to make this community of member-states work. These ground-rules are found in the original EEC Treaty, e.g. the important political and pro-integration role of the European Commission to defend the common interests of the member-states. This method has been successful from the 1960s to the end of the 1980s, when the EEC consisted of relatively homogeneous member-states struggling to rebuild their economies after the Second world war. Essential factors in this success were de-politicization and technocratic decision-making through elites, especially at the helm of the European Commission. These bureaucratic elites came from the Commission, national bureaucrats and experts also played an immensely important role in the so-called comitology procedures. Decision-making by 'Brussels' therefore includes many national officials. Because of weak input legitimacy and lack of democracy, the focus was on output legitimacy and good decision-making in the interest of the 'general good'. Arend Lijpharts' theory of consociationalism has been applied to decision making in the European Community. This theory explains stability in heterogeneous societies such as the Netherlands in the past with its separate and homogeneous protestant, catholic, liberal and socialist pillars with each their own schools, broadcasting corporations and politicians. Politicians and elites from the pillars cooperated in The Hague and this cooperation was characterized by stability, at least for some decades. De-pillarization was inevitable in later years as the pillars became less homogeneous. Applying consociationalism to the European Community would imply de-politicization and elite cooperation[2]. The peoples of the member-states form the pillars. Politicization would be the worst option in this consociationalist view because it could lead to destabilization. Politics is for the member-states and technocracy for the EC level. This construction could last as long as the number of member-states was low and the number of issues the EEC-level dealt with, was not too high. Inherent in the European integration concept is the idea of an 'ever closer union'. So, from the beginning it was apparent that this method could not last forever. Old habits, however, hardly die. There are many path-dependencies involved.

The fear to politicize is also seen in another characteristic of the Community method: an unidentified finality. There is no agreement on the end-goal of the European integration process apart from general terminology such as 'ever closer union' in the preamble of the EEC Treaty, the preservation of peace, protection of human rights and creation of strong economies. Former Prime minister Cameron of the UK, in his negotiations with the EU before the referendum on Brexit in 2016, tried unsuccessfully to water down the words 'ever closer union'. Lack of agreement among the Member States on the end-goal does not mean that the European integration process is not a goal-oriented exercise. The EU as it has grown is in its legal characteristics first and for all 'functional polity that is

[2] See for an example Dimitris Chryssochoou, *Theorizing European Integration* (Sage: 2001), chapter 5 ('Theorizing the European Consociation')

organized around objectives"[3]. The European Court of Justice has used in its case law a systematic and teleological approach making arguments on the basis of the goals and the system of the Treaty or a specific legislative text in a directive.

In 2004 I asked in another contribution the question whether unidentified finality could be considered as an essential element of a European Political Identity. At that time my answer was moderately positive in that more time was needed for the member-states to decide on the finality of the EU[4]. Disagreement between the member-states was still too strong. The negative result of the referenda on the constitutional treaty of the EU in 2004 in France and the Netherlands only strengthened resistance to far-fetched prospects about the future of the EU. The then Dutch government in a reaction on the negative outcome of the referendum even banned the European flag for a certain period. Pragmatic and practical steps are needed, not prospects.

We need to know, however, what the EU is about. In order to come to the beginning of an answer to this difficult question and, at the same time, to show the demise of the Community method I will use the following structure and method. In three main chapters I will pay attention to the early years of the EEC, the dominance of the neo-liberal model in the 1980s until the financial crisis of 2008, and, finally the options used in theory and practice to re-lance the European project. The titles of the respective chapters are related to the terms embedded, dis-embedded and re-embedded liberalism, taken from both Polyani John Ruggie. The method is will use is to assess the influence of the general context in the years 1958-1985, 1985-2008 and 2008+ corresponding to the three tiered structure of this contribution. With general context I mean the general political conditions, e.g. periods of tension in during the Cold War, the ascent of neo-liberalism and the end of the Cold War, and the aftermath of the financial crisis of 2008.

3. The Treaty of Rome (1958) and its premises in an area of embedded liberalism

The conclusion of the Treaty of the EEC in Rome ended a period of deadlock in the European cooperation process, that started in 1954 when the French Parliament refused to discuss the plans for a European Defense Union and a Political Union. This refusal had more to do with resistance against cooperation with West-Germany, but the death of Stalin in 1953 ended one of the most serious stages of the Cold War. The focus of the European cooperation project was now to be laid on the economy. Sensitive areas of 'high politics' related to sovereignty, such as defense and foreign policy, were taboo for the next thirty years. The core of the project became a 'common market', a 'common commercial policy' and a

[3] François-Xavier Millet, "The Respect for National Constitutional Identity", in *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014), 258.

[4] Herman Voogsgeerd, "Unidentified Finality as an essential element of European Political Identity", *Siegener Periodicum zur Internationalen Empirischen Literaturwissenschaften* (2002), 313.

'competition authority' at the European level. I agree with Walters and Haahr, who put the common market as a component of what John Ruggie at the global level called 'embedded liberalism'[5]. At world-wide level this meant a combination of 'moderate' free trade within frameworks such as the GATT with the ability of nation states to manage their welfare states through safeguard procedures. At the EEC level a comparable combination existed during this period: there is a right to free movement in the common market, but there is a 'largely positive view of the nation state' in social welfare related topics[6]. This was definitely so during the so-called transitory stage that ended the 31st of December 1969. Member-states had certain safeguarding powers, e.g. in case a sudden surge in the import of certain products from another member-state (Italy) would cause problems in the domestic market of the importing member-state (France), the European Commission could allow restrictions to that trade[7]. The member-states still had discretionary powers to limit free movement. The free movements of the common market served an end, but were not an end in itself, but only 'a tool' to pool energies of member-states and to realize peace, stability, economic development and a rising standard of living[8].

Hans-Peter Ipsens' work related to so-called 'special purpose associations' (*Zweckverbände*) of functional integration has been very influential in the earlier years of the EEC. Functional integration was the key to success and technocratic solutions for the common good were to be preferred instead of politics and emotions. Special purpose associations were definitely no 'emotional associations'. Special purpose association were also no general purpose associations, only states were to be qualified as general purpose associations. The EEC could therefore not become a general purpose association. It was important to downplay the finality of the integration process: 'ever closer union' in the preamble of the EEC Treaty was sufficiently vague to serve this purpose. The nature of the European integration process had to remain open in character, at least as long as the member-states as Masters of the Treaties (*Herren der Verträge*) did not agree on the future of the integration process. Ipsen seemed to be content with the term 'Community' chosen for the EEC. The European project needed a term, that was not occupied by other entities such as (con)federation or union[9]. Examples of 'special purpose associations' were to be found in the economic realm, e.g. a customs union, the four economic freedoms, non-discrimination on the basis of nationality, but Ipsen did not exclude topics outside this area, e.g. cooperation on foreign policy. The term special purpose association is therefore extremely broad in scope and is not

[5] William Walters and Jens Henrik Haahr, "The Common Market", *Governing Europe. Discourse, Governmentality and European Integration* (London and New York: Routledge, 2005), 58.

[6] William Walters and Jens Henrik Haahr, ibidem, 44.

[7] Italian refrigerators case, Case 13/63 *Italy versus Commission*. [1963] ECR, 351.

[8] William Walters and Jens Henrik Haahr, ibidem, 44.

[9] Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht in Einzelstudien* (1984), 80-92.

limited to functional areas, e.g. agriculture, transport or specific sectors of the economy. The term is also flexible as Ipsen did not oppose to occasional cases of desintegration[10].

Although the concept is powerful in its potential to clarify the earlier years of the EEC and the first successful steps towards economic integration in Europe, I agree with the complaint heard from Giandomenico Majone from the title of his book *Integration by Stealth*[11]. Over the years and after many Court cases from the European Court of Justice in Luxembourg, integration in the economic sphere (and therefore also political because the two are difficult to separate) was pushed to a level not known to the original authors of the Treaty. This proofs the success of the concept. But in fact, the common market was in the words of Sauter and Schepel 'imposed on the member-states' by the European Court of Justice[12]. Especially after the transitory stage in 1970 the common market freedoms were interpreted more and more extensively by the ECJ. This happened at first for the important free movement of goods with important Court cases in *Dassonville* and *Cassis de Dijon*[13]. Not much later case law concerning free movement of persons followed. The free movement of services and capital were essentially dealt with in the following period of 'dis-embedded liberalism'.

4. The Single European Act (1985) and the ascent of neo-liberalism and dis-embedded liberalism

The mid 1980s became a real watershed in the history of the European integration project. Apart from the beginning years and the active EEC Commission under president Walter Hallstein that lasted until the empty chair crisis in 1963, the period between 1985 and 1992 also may be qualified as a very successful period of European integration, this time under European Commission president Jacques Delors. The context during these years changed dramatically. The rise of supply-side economics, combined with pleas for deregulation and privatization, influenced the dominant discourse in the EEC. The famous Lord Cockfield report on the costs of non-Europe laid the groundwork for the realization of the 'internal market', an area without internal borders (article 14, paragraph 2 EC, now article 26, paragraph 2 TFEU)[14]. This discursive change from common to internal market is not without impact. In the period before 1985 the role of governments was seen as essential, after 1958 this changed. Walters and Haahr see this development as "something of a reversal in the figures of the state and the market"[15]. The market is

[10] As quoted in Voogsgeerd.

[11] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, (Oxford: Oxford University Press, 2005).

[12] Wolf Sauter and Harm Schepel, *State and Market in European Union Law*, (Cambridge: Cambridge University Press, 2009).

[13] Case 8/74, *Dassonville* [1974] ECR, 837 and case 120/78, *Cassis de Dijon* [1979] ECR 649.

[14] Cockfield White Paper, 1985, *Completing the Internal Market*, Luxembourg, Office for Official Publications of the European Communities.

'good' and states have to interfere as little as possible. Giubonni is of the same opinion, when he talks about the reversal of the relationship between social policy and as he calls it 'the law of economics'[16]. The premises on which the EEC Treaty of Rome rested changed. Asymmetries did arise between national democratic control and world-wide economic processes and also between social rights and economic market freedoms[17].

New areas were tried in case law of the ECJ. Free movement of capital was completely liberalized with the Treaty of Maastricht (1992). Case law concerning this freedom has been quite radical in the sense that even minor dissuasive effects on capital moves would trigger this freedom. Government shareholding positions in companies, so-called 'golden shares' were deemed to be against freedom of capital. The Volkswagen-battle between Germany and the European Commission lasted several years. In 2007 the ECJ took the side of the Commission concerning the so-called Volkswagen law, that protected certain (public) shareholders[18]. Free movement of services was radicalized as well. Now that an internal market in goods was almost completely realized, the service economy needed to be pushed. Posting of workers from other member-states within the freedom to provide services was put on the agenda of the European legislator after the case *Rush Portuguesa*[19]. Employers from member-state A, who performed a service in another member-state, were allowed to bring their own workers temporarily to the other member-state under the labour conditions of the home state. In an economically diverse EU with richer and poorer countries, especially after the accession of eight Central and Eastern European countries to the EU, this had large consequences. This development lead to the posting of workers directive 96/71/EC, which allowed the host member-state to impose at least the national minimum wage on these workers, but for many richer member-states this was not enough. On top of this, many self-employed from poorer countries profited from the freedom of establishment and they competed on price with their colleagues from richer European countries. Economic freedoms seemed to be given priority to social protection, as the famous cases of *Viking* and *Laval* from the end of 2007 showed[20]. Collective actions by trade unions were tested against the freedom of establishment in *Viking* and against the freedom to provide services in *Laval*. The important link in embedded-liberalism between free trade externally and welfare

[15] William Walters and Jens Henrik Haahr, "The Common Market", *Governing Europe. Discourse, Governmentality and European Integration* (London, New York: Routledge, 2005), 44.

[16] Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge: Cambridge University Press, 2006), 20.

[17] See especially the strong arguments of Fritz Scharpf, *Governing in Europe. Effective and Democratic?*, (Oxford: Oxford University Press, 1999), chapter 2 'Negative and positive integration'.

[18] Case C-112/05, *Commission versus Germany*, 23 October 2007. See on this case the short contribution of Wolf-Georg Ringe, "The Volkswagen Case and the European Court of Justice", *Common Market Law Review*, vol. 45, 2008.

[19] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417.

[20] Case C-438/05, *Viking* [2007] ECR I-10779 and case C-341/05, *Laval* [2007] I-11767.

state internally was finally broken. Many authors protested against these radical developments. Joerges and Rödl talk about an EU social deficit and argue that social policies should have been left to the member-states[21]. Holmes is of the opinion that one should re-examine "the balance between national regulatory sovereignty and the goal of trade liberalization", now that market integration within the EU "begins to bite on more sensitive areas"[22]. The financial crisis that struck the U.S. and the Western world in 2008 also had large consequences, although these consequences came in the open much later. In 2011 Crouch still asked the question why neo-liberalism did not die after these vehement crises[23]. Only in 2016 with the UK referendum on a Brexit and the election of president Trump in the U.S. did it become clear that the crisis in neoliberalism could have large consequences.

5. The Treaty of Lisbon (2009) and after. Re-embedding liberalism?

Negotiations on the new Lisbon Treaty more or less coincided with the financial and economic crisis that struck Western countries in 2008, but that crisis did not have any immediate impact on the text of the new Treaty. The question has been raised whether 'Lisbon' led to major changes in the legal order of the EU[24]. Millet answers the question in the negative as path-dependency is more important than newer developments. Moreover, the Court of Justice, after Lisbon called CJEU instead of ECJ, does not have incentives to change its case law under the new Treaty[25]. Less drastic changes did nonetheless happen at the level of the new Treaty text with consequences of the case law of the CJEU. Article 4, paragraph 2 of the TEU is of interest here. In this provision the national constitutional identity of the Member states is, from now on, explicitly protected. This identity consists of in the words of the provision: "their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security". This provision has to be operationalized by the CJEU and balanced against the interests of the internal market and the standards of article 2 TEU in which the foundational values of the Union are mentioned: "respect for human rights, freedom, democracy, equality, the rule of law, including the rights of persons belonging to minorities".

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[21] See especially Christian Joerges and Florian Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European integration: Reflections after the Judgements of the ECJ in Viking and Laval", *European Law Journal.* 2009, 15:1, 1-19.

[22] Peter Holmes, "Trade and 'domestic' policies: the European mix", *Journal of European Public Policies*, 13: 6 (2006), 816.

[23] Colin Crouch, *The Strange Non-Death of Neoliberalism*, (Polity press, 2011).

[24] See the volume edited by Loïc Azoulai, *The Question of Competence in the European Union*, (Oxford: Oxford University Press, 2014).

[25] François-Xavier Millet, "The Respect for National Constitutional Identity", p. 258 in the volume mentioned in the preceding reference.

This new focus on the constitutional identity of the member-states is one example of re-embedding liberalism. In the earlier stage of dis-embedded liberalism the scope of the four economic freedoms of the internal market was widened as much as possible. The internal market should become as close to a domestic market as possible. But in this third stage important interests of the member-states were to be better protected than before. The German Constitutional Court in its Lisbon Decision emphasized this element of constitutional identity. As in its earlier *Solange* decisions and the Maastricht Decision the Constitutional Court reiterated that the EU, as a *Staatenbund*, a confederation, is bound to respect fundamental human rights (Solange), the principle of democracy (Maastricht Decision) and now the constitutional identity of the member-states. That this last topic is taken seriously by the CJEU as well became clear in the *Omega*, *Sayn-Wittgenstein* and *Runevic-Vardyn* cases[26]. The case *Sayn-Wittgenstein* is the most interesting of the three, as that case explicitly refers to the constitution of the Republic of Austria in which there is a provision, article xx, that bans the bearing of nobility titles. The CJEU accepted this ban and this implied that a female German-born self-employed selling perfumes etc. to clients in Austria was not allowed to call herself princess (Fürstin) of Sayn-Wittgenstein in her advertising. This, although there was a clear link with her activity as seller of perfume. *Omega* concerned the banning in Germany of laser games for children, accepted by the CJEU on public interest grounds. *Runevic-Vardyn* dealt with spelling rules, that differed between Poland and Lithuania. Here the CJEU accepted the law of the land, member-states do not have to respect the spelling rules of another member-state[27]. The president of the CJEU, Lenaerts, in an academic contribution admitted that "where the core values of the Union are not in danger, the ECJ favours 'value diversity'"[28]. This argument presupposes that in case of a conflict between the core values of the EU and the core values of a member-state the CJEU might choose for the first. But later Lenaerts admits that the CJEU will do its best to take both EU and national interest into account. It will try to accommodate both levels[29]. An open conflict between the member-state and the EU level is not a good thing. This will have to be avoided.

Respect for the constitutional identity of the member-states is one relatively small element of re-embedding the internal market. More difficult is to address the general consequence of decades of internal market case law: an increasing 'economization'. Many aspects are seen first and for all through an economic lens.

[26] Case C-36/02 *Omega Spielhallen*, [2004] ECR I-9609; case C-208/09 *Sayn-Wittgenstein*, [2010] I-3696 and case C-391/09 *Runevic-Vardyn*, [2011] ECR I-3787.

[27] Compare this case with the much older case *Konstantinidis* (C-168/91, ECR [1993], I-1191) in which Germany had to respect the Greek alphabet, in which the name was written differently than the German authorities did. For professional reasons related to the economic freedom of persons (workers) the ECJ supported the argument brought forward by Konstantinidis.

[28] Koen Lenaerts, "The Court's Outer and Inner Selves", *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015), 60.

[29] Koen Lenaerts, ibidem.

Authors submit that the case law of the CJEU is characterized by 'some degree of economic bias'[30]. The CJEU enables negative harmonization through the four economic freedoms of the Treaty in the absence of sufficient positive harmonization through EU legislation because of a lack of competence of the EU in a specific area or the lack of sufficient votes to legislate from the member-states. Economization and de-politicization are causes of unease among large parts of the population. William Davies, in a critical analysis of neoliberalism asks himself why economics should be "a better analytical basis for government than other political or scientific forms of authority"[31]. De-politicization and government by experts, useful in the beginning years of the EEC, have reached their limit. Moreover, primacy of economics and the increasing role of experts in Brussels and national capitals did have redistributive consequences[32]. The referendum for a Brexit can be qualified as a return for the primacy of politics by large parts of the population who felt forgotten by their own national government. Brexit itself can therefore be qualified as an example of re-embedding markets[33]. The EU has to react on this development and forget about the traditional Community method. Politics matters.

6. Plans for the immediate future of the EU

Making plans for the immediate future of the EU is difficult as ideas concerning the end-goal of the EU still diverge in 2017. As the French President Emmanuel Macron in his Sorbonne lecture of 26 September 2017 focused on the need to 'relaunch' European integration, because of a lack of a long-term vision and suffering from the need for unanimous decisions, he perfectly addressed the tension between the two. A long-term vision is impossible as long as the member-states disagree on this. The Dutch Prime Minister Rutte, for example, is only interested in practical and down-to-earth decisions and not at all in blueprints for an EU future[34]. How to solve this dilemma?

The European Commission White Paper on the future of Europe of March 2017 is the first main endeavor on the future for the EU 27 after Brexit that needs to be discussed here. Five scenarios are given in the White Paper. All five do not mention legal or institutional aspects because the Commission assumes that form will follow the function[35]. This assumption is acceptable as the scenarios are meant only to stimulate thinking. It is important, however not to limit oneself to the

[30] D. Leczykiewicz, "Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval", *Viking, Laval and Beyond* eds. M. Freedland and J. Prassl, (Hart Publishing, 2014), 234.

[31] William Davies, *The Limits of Neoliberalism*, (Sage, 2017), 10.

[32] See the interesting analysis by David Kennedy, *A World of Struggle. How Power, Law and Expertise Shape Global Political Economy*, (Princeton, 2016).

[33] See Jonathan Hopkin, "When Polanyi met Farage: Market fundamentalism, economic nationalism, and Britain's exit from the European Union", *The British Journal of Politics and International Relations*, 2017, 19 (3), 465-478.

[34] Speech of Emmanuel Macron, Paris, Sorbonne, 26th of September 2017.

[35] European Commission, *White Paper on the Future of Europe*, 2017, p. 15.

functionalist logic. Scenario 1 to 5 do not seem to fit in a continuum from less to more integration. The first scenario, 'Carrying on' implies almost no change to the actual stage of the EU and scenario 2 'nothing but the single market' is a step backwards and at the same time not an improvement with respect to the issues mentioned before. Scenario 2 will automatically imply a larger say concerning the practicalities of the internal market for member-states and their national courts. The scenario even specifically mentions border controls at the internal borders of the EU, and steps backwards concerning free movement of workers and services[36]. Scenario 3, 'those who want to do more' is a continuation of an already existing possibility of enhanced cooperation. In article 20 TEU a general provision deals with the possibility of enhanced cooperation by a smaller number of member-states, but this is limited to the non-exclusive competences of the EU. Specific provisions on special cooperation exist for example in the areas of Common Foreign and Defense cooperation (article 42, paragraph 6 and article 46 TEU) and mutual recognition of judicial decisions in the area of criminal law (article 82, paragraph 3 TFEU), Scenario 4, 'doing less more efficiently' focuses on implementation and enforcement issues. A more efficient EU is welcomed, but in return topics have to be given back to the level of the member-states. Specifically mentioned policy areas to return to the member-states are parts of employment policy not directly related to the internal market, public health and regional development. On the other hand a European Border and Coast Guard takes over control of the external border of the EU. The idea of a deal in giving some powers back to the member-states and enforce other powers more effectively and efficiently at EU level is an attractive one. It will solve part of the problems mentioned before concerning the dominance of neoliberalism. The fifth scenario, 'doing much more together' does not seem realistic at this moment in time. Scenario 3 has already been criticized by some Central and Eastern European countries and now also by President of the European Council, Donald Tusk. He seems to have taken a position in the middle, no far-sights, only practical deals in a limited number of issues such as defense, trade deals with third countries, combatting cyber-crime, solidarity in climate and energy issues, a new social dimension in the EU, fiscal justice, control of immigration and digital revolution. This looks very much like the first scenario.

The White Paper and the plans of President Tusk both do not refer to institutional and legal issues. Nevertheless, it will be inevitable to deal with these issues in the near future as well. In order to end with the obsolete Community method and to try new roads the relationship between the EU and its member-states will have to be addressed. What is the role nowadays of the Masters of the Treaties (*Herren der Verträge*) after more than sixty years of European law? Some authors assume that the nation state is the main problem in the EU[37]. They are the cause of the

[36] European Commission, Ibidem, p. 18.

malfunctioning of the EU at this moment. Others assume that the EU should stop weakening the nation state. This view is now adhered to by nobody less than former UK Prime Minister Tony Blair. In my view this is only possible by naming the EU what it actually is, not an ordinary international organization but a confederation, a *Staatenbund*. To a certain extent the member-states need to be protected and they need to be able to take measures in extraordinary situations. But the confederation has to be capable of taking decisions. If member-states only disagree, there is no strong future for the EU. Some decision-making mechanisms need therefore to be in place in the confederation.

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[37] See Ulrike Guérot, *Warum Europa eine Republik werden muss: Eine politische Utopie*, 2nd edition, (Piper, 2016).

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